MALAYAN UNITED BANK BHD.

v.

NGU DIING YIING & ANOR.

HIGH COURT BORNEO
ABDUL KADIR SULAIMAN JC
[SUIT NO. 84 OF 1988]
12 MARCH 1992

CIVIL PROCEDURE: *Sale by public auction - Setting aside - Whether applicant has locus standi - Person having beneficial interest - Allegation of material irregularity or fraud in publishing or conducting the auction sale - Whether applicant has sustained injury.*

CIVIL PROCEDURE: *Power of a Judge - Exercise by SAR - Whether valid.*

LAND LAW: *Caveat - Notice - Effect of.*

This is an application by Lii Tat Credit and Mortgage Sdn. Bhd., under O. 47 r. 7(b) and (e) RHC 1980 to set aside the sale by public auction of the defendant's 2 parcels of land described as Lot 37 Block 14 Seduan Land District and Sibu Lease No. 55745 (the said parcels of land) at the instance of the plaintiff.

At the commencement of the hearing, Counsel for the plaintiff raised a preliminary objection on the *locus standi* of the applicant on the ground that the applicant does not fall under any of the three categories of persons under r. 7(c) of the RHC.

The learned Judge however ruled that the applicant has the *locus standi* to bring up the application being person whose interest are affected by the sale.

The Counsel for the applicant argued that since the particulars and conditions had not been submitted to and approved by the Judge as required under r. 7(b) but instead were submitted and approved by SAR, the order for sale of the said parcels of land by the learned SAR was contrary to O. 47 and therefore irregular and should be set aside.

The other ground put up by the applicant is on the ground of material irregularity or fraud in publishing or conducting the auction sale. The learned Counsel for the applicant submitted that as the parcels of land were ordered to be sold free from encumbrances, thereby extinguishing the caveat of the applicant, it is contrary to the Court order of 19 January 1987 allowing the caveat to remain in force until the disposal of Sibu High Court Suit No. 184/ 1986.

Learned Counsel for the plaintiff submitted that the order of Court of 19 January 1987 was made in the absence of the defendant. Had the defendant been present the question of caveatable interest of the applicant would have been resolved and the caveat of the applicant would likely be ordered to be removed.

Counsel for the plaintiff further submitted that the application by the applicant should not be entertained on account of the conduct of the applicant in taking part in the auction sale wherein he was a successful bidder in respect of Lot 37 Block 14 Seduan Land District.

Thus the applicant had acquiesced to or consented to the auction sale being carried out in the manner ordered by the learned SAR and is therefore estopped from applying to set aside the sale.

Held:

[1] The exercise of the power of a Judge under r. 7(b) by the SAR is perfectly valid and regular. Hence this ground for setting aside must fail.

[2] As regards to the argument of irregularity or fraud, the applicant must satisfy the Court that he has sustained substantial injury by the reason of such irregularity or fraud. Based on the facts the order for sale has caused substantial injury to the applicant whereby the defendant is free to dispose of all the 5 parcels of land without his consent.

[3] In the final analysis the order for sale made by the learned SAR for the parcel of land to be sold free from encumbrances is erroneous resulting in a material irregularity in publishing it and that the applicant has sustained substantial injury by reason of such irregularity.

[Application allowed. Order for sale set aside.]

Case referred to:

Ling Tee Huah Credit & Leasing Sdn. Bhd. & Ors. v. Lii Tat Credit Mortgage Sdn. Bhd. & Anor. [1990] 2 CLJ (Rep) 399 ***(cit)***

Legislation referred to:

Courts of Judicature Act 1964, s. 3
Land Code, ss. 175, 177, 178, 180
Rules of the High Court 1980, O. 32 r. 9, O. 47 r. 7 (b), (e)

For the plaintiff - Y.Y. Sim (Margaret Teng Appearing); M/s. David Teng & Co.
For the applicant - Stephen Chung; M/s. Stephen Chung
For the defendant - Absent

JUDGMENT

Abdul Kadir Sulaiman JC:

This is an application by Lii Tat Credit & Mortgage Sdn. Bhd., under O. 47 r. 7 (b) & (e) of the Rules of the High Court 1980 (RHC) to set aside the sale by public auction of the defendant's 2 parcels of land described as Lot 37 Block 14 Seduan Land District and Sibu Lease No. 55745 (the said parcels of land) at the instance of the plaintiff.

Rule 7(b) of the RHC, as far as it is relevant for this purpose, states as follows:

> The particulars and conditions shall be drawn up by the sheriff or by his solicitor, and shall be submitted for the approval of a Judge; and

Rule 7(e) of the RHC states as follows:

> Where immovable property or any registered interest therein has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale may apply to the Court or a Judge to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:
>
> Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court or a Judge is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

At the commencement of the hearing, the learned Counsel for the plaintiff raised a preliminary objection on the *locus standi* of the applicant to make this application, on the ground that the applicant does not fall under any of the three categories of persons enumerated in r. 7(e) of the RHC. I overruled the preliminary objection for the reason stated below.

The applicant in the course of its business entered into a loan agreement (the agreement) with the defendant as a borrower for a sum of RM21,500 executed on 30 January 1985. The loan was to be payable together with interest on or before 15 July 1985. Clause 2 of the said agreement stipulates:

> 2. You (the lender/applicant) shall be entitled and is at liberty to caveat all or any of the borrower's (defendant) landed properties already acquired or hereafter to be acquired by the borrower and such caveat or caveats shall not be withdrawn or defeated by lapse of time until the said principal sum has been fully paid by the borrower.

Pursuant to Clause 2 of the agreement, the applicant lodged a caveat *vide* Sibu Instrument No. L2246/1985 and registered on 13 May 1985 in respect of the defendant's following parcels of land:

1. Lot 37 Block 14 Seduan Land District;
2. Sibu Lease of Crown Land No. 55745;
3. Lot 418 Block 4 Sibu Town District;
4. The defendant's 1/6th share in Lot 4 Block 9 Engkilo Land District; and
5. The defendant's ½th share in Lot 406 Sungai Merah Town District.

As event turned out, the defendant failed to pay the said loan covered by the agreement. But subsequently the defendant lodged or caused to be lodged for registration a memorandum of transfer affecting Lot 37 Block 14 Seduan Land District (one of the said parcels of land which is covered by the caveat of the applicant) and on 18 July 1986 the applicant received a notice under s. 178 of the Land Code. The effect of the notice is that the caveat of the applicant would automatically lapse upon the expiration of 3 months after the notice given unless the applicant gives notice to the Registrar that application for an order to the contrary has been made to the High Court.

The applicant filed an originating summons dated 14 October 1986 against the defendant and by an order dated 20 October 1986, Chong Siew Fai J ordered that Caveat No. L2246/1985 shall remain in force until the disposal of the originating summons or until further order.

On 2 October 1986 the applicant issued a writ of summons in High Court Suit No. 184/1986 for:

1. A declaration that the applicant is entitled to or to be beneficially interested in the 5 landed properties of the defendant.
2. Alternatively, a declaration that on the true construction of the agreement and on account of the defendant's pledge in respect of his landed properties as security for the said loan the applicant has an interest in the landed properties of the defendant or is entitled to or to be beneficially interested in the landed properties of the defendant.
3. A declaration that the defendant is in breach of the agreement and is not entitled to lodge or cause to be lodged for registration of a memorandum of transfer affecting Lot 37 Block 14 Seduan Land District and the same ought to be removed.
4. A declaration that Caveat No. L2246 lodged by the applicant and registered at the Sibu Land Registry Office on 13 May 1985 in respect of Lot 37 Block 14 Seduan Land District shall not lapse.

5. Judgment against the defendant in the sum of RM21,500 and interest thereon in the sum of RM5,385.75.

6. Further or other relief.

Following the issue of the writ, the applicant filed an originating summons dated 20 October 1986 and by a Court order dated 19 January 1987, Chong Siew Fai J ordered that the Caveat No. L2246/1985 lodged by the applicant and registered at the Sibu Land Registry Office on 13 May 1985 shall remain in force until the disposal of Sibu High Court Suit No. 184/1986.

As regards the suit, an order under a summons for directions has been made on 17 May 1991 and the suit to date is still pending. For this reason, the said caveat remains in force by virtue of the Court order of 19 January 1987.

On 12 March 1990 a prohibitory order was made against the defendant at the instance of the plaintiff in respect of a judgment entered against the defendant dated 17 July 1989 (for the sum of RM117,708.45 and interest at the rate of 15.5% per annum from 28 June 1988 until the date of judgment and interest at the rate of 8% per annum from the date of judgment until full settlement and costs of RM225), prohibiting and restraining him from transferring, charging or leasing the respective properties which include the said parcels of land covered by the applicant's caveat.

Pursuant to a summons for directions dated 28 March 1990, the learned Senior Assistant Registrar made an order dated 29 June 1990, *inter alia*, that:

(a) The said parcels of land of the defendant that is Lot 37, Block 14 Seduan Land District and Sibu Lease No. 55745 be sold by public auction to satisfy the judgment debt due to the plaintiff covered by the prohibitory order.

(b) The draft proclamation of sale together with the conditions of the sale and notice of sale be drawn up by the licensed auctioneer and after approval by the advocates for the plaintiff be submitted to the Senior Assistant Registrar for final approval.

(c) The sale shall be free from any encumbrances.

On 8 March 1991 the said parcels of land were put up for auction. The applicant bid in the auction and was a successful bidder in respect of one of the said parcels of land that is Lot 37 Block 14 Seduan Land District. The price was RM43,000. One Hii Hing See was the successful bidder for the other parcel for the price of RM5,120. The proceeds of sale of the said parcels of land were duly deposited in Court.

By a summons in chambers dated 6 June 1991, the plaintiff sought for the following orders, *inter alia*:

(a) The auction sale of the defendant's said parcels of land be confirmed.

(b) Payment out of the proceeds of sale.

(c) Various caveats including caveat Instrument No. L2246/1985 (lodged by the applicant covering in all the 5 parcels of land) be removed.

(d) The two Court orders given by Chong Siew Fai J dated 20 October 1986 and 19 January 1987 registered respectively as Sibu Instrument No. L5711/1986 and L716/1987 be removed.

This summons in chambers is still pending in the light of the application for the setting aside of the auction sale by this applicant now.

That briefly are the facts leading to this application. Now, as to the preliminary objection brought by the learned Counsel for the plaintiff, I overruled it as I am of the view that the applicant has the *locus standi* to bring up this application being person whose interests are affected by the sale. The order for sale was that the said parcels of land were to be sold free from encumbrances. The effect of the order would be that the purchaser would take the lands free from the caveat of the applicant. This is clearly in violation of the Court order of 19 January 1987 when the Sibu High Court Suit No. 184/1986 had not yet been disposed off. There is no evidence that the order has been vacated and therefore it is still in force. If the applicant is prevented from making this application on the ground that he has no *locus standi*, he will be greatly prejudiced. In support of his objection, the learned Counsel for the plaintiff cited the case of *Ling Tee Huah Credit & Leasing Sdn. Bhd. & Ors. v. Lii Tat Credit Mortgage Sdn. Bhd. & Anor.* [1990] 2 CLJ (Rep) 399 where it was held that the 1st defendant caveating land on the basis of a loan agreement has no beneficial interest in the property to sustain the caveat. The learned Counsel submitted that the person whose interests are affected by the sale as envisaged in O. 47 r. 7(e) of RHC must be a person having a beneficial interest in the property in question. Since the applicant is in a similar situation as the 1st defendant in the case cited, he therefore has no *locus standi* to make this application. I do not think I can agree with the learned Counsel's line of submission because firstly, the application before me is not one to determine whether or not the applicant has a beneficial interest in any of the 2 or 5 parcels of land which he has caveated. That issue is yet to be determined in the High Court Suit No. 184/1986 which is pending disposal. What is clear as of now is under s. 175 of the Land Code, for so long as a caveat is in force, no dealings with the land which is the subject matter of the caveat are permitted except as provided by the section. By the order of Court dated 19 January 1987 the caveat of the applicant is in force. So, if anything done to the subject land to his prejudice he must be a person whose interests are affected within the relevant rule. At this stage he need not satisfy the Court that he is a person having the beneficial interest in the subject land. Secondly, the interest envisaged by the rule need to be construed widely and not narrowly as suggested by Counsel as otherwise great injustice would be caused to the applicant. While the issue of the validity of his caveat is yet to be decided, the lands subject to his caveat is to be disposed off free from any encumbrances which include his caveat which under the Land Code will remain in force unless withdrawn under s. 180, or lapse under s. 178, or ordered by Court to be removed under s. 177. So, I would hold that interest under the rule need not necessarily mean beneficial interest. Such being the case, the applicant has *locus standi* to make this application before me now.

Having said that, I will now go into the merit of the application. On the first ground, r. 7(b) requires that the particulars and the conditions as drawn shall be submitted to the Judge for approval. In this case, the particulars and conditions had not been submitted to and approved by the Judge but instead were submitted to and approved by the Senior Assistant Registrar. See Encl. (37). The learned Counsel for the applicant says that in the circumstances the order for sale of the said parcels of land by the learned Senior Assistant Registrar was contrary to O. 47 and therefore irregular and should be set aside. He further said that the RHC has not clearly defined who is a Judge and who is not. Section 3 of the Courts of Judicature Act 1964 provides who is a Judge and the same Act defines Registrar which includes a Senior Assistant Registrar. In the circumstances, he says, a Judge does not include a Senior Assistant Registrar. It might well be so for the purpose of the Courts of Judicature Act 1964 but if one were to look at O. 32 r. 9 of the RHC, the answer is to be found there. The rule says:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

The learned Counsel does not indicate of any exception to the rule in this case as having taken away the power of the Senior Assistant Registrar from the general application of the rule. In the circumstances, I am of the opinion that the exercise of the power of a Judge under r. 7(b) by the Senior Assistant Registrar in this case is perfectly valid and regular. Hence, this ground for setting aside the sale must fail.

The other ground put up by the applicant for asking this Court to set aside the auction sale is on the ground of a material irregularity or fraud in publishing or conducting it. To succeed on this ground the applicant must satisfy the Court that he has sustained substantial injury by reason of such irregularity or fraud. The learned Counsel for the applicant submitted that as the said parcels of land were ordered to be sold free from encumbrances, thereby extinguishing the caveat of the applicant, it is contrary to the Court order of 19 January 1987 allowing the caveat to remain in force until the disposal of Sibu High Court Suit No. 184/1986. The order for sale has caused the applicant to sustain substantial injury because the applicant's caveat not only governs the said parcels of land but also the 3 other parcels and the consequence of the removal of the caveat leaves the other 3 parcels no longer to be protected by the caveat. The injury sustained by the applicant would thereby be substantial in that the defendant is free to dispose of all the 5 parcels of land without his consent. In the face of the Court order allowing the caveat to remain, the order of the Senior Assistant Registrar in the circumstances is irregular and its effect is to cause substantial injury to the applicant. The learned Counsel for the plaintiff, on the other hand, submitted that the order of Court of 19 January 1987 was made in the absence of the defendant. Had the defendant been present the question of caveatable interest of the applicant would have been resolved, and on the authority of *Ling Tee Huah Credit & Leasing Sdn. Bhd.* (*supra*), the caveat of the applicant would likely be ordered to be removed. Also, that the order was made in the action between the applicant and the defendant of which the plaintiff was never a party. I see no merit in the submission of the Counsel for the plaintiff. The order of the Court of 19 January 1987 was a valid order made in the absence of the defendant who was duly served with the originating summons. Though the plaintiff was not a party leading to the making of the order, the order binds all persons having dealings with the subject matter covered by the order. Non-compliance with the order may amount to contempt.

Be that as it may, in determining whether the conditions of sale, which flow from the order of the learned Senior Assistant Registrar, for the auction sale is regular or otherwise, I need to consider the effect of the conditions of sale as approved by the learned Senior Assistant Registrar on the parties involved in the process of the sale of the said parcels of land. I need to consider this aspect to enable me to decide as to the seriousness of the irregularity in non-compliance with the order of the Court of 19 January 1987. To regularize the conditions of the auction sale it merely requires the amendment to the order to the effect that the sale of the two parcels of land shall be subject to the applicant's caveat in question and if this is done, it will no longer cause substantial injury to the applicant as the parcels of land will be sold subject to his caveat. As to the status of the caveat, it will accordingly be decided when Sibu High Court Suit No. 184/1986 is disposed off later. In my considered opinion, this is not possible because the conditions of sale is the basis of the contract for the auction sale. To rectify the conditions would tantamount to imposing conditions which is not within

the contemplation of the successful bidders. They entered into a contract to buy lands free from encumbrances but with the new condition imposed, they would be getting something which they never contracted for. In the circumstances, the conditions cannot be varied. If it is so, it is established that the conditions for sale without having regard to the Court order of 19 January 1987 would result in the applicant sustaining substantial injury.

Learned Counsel for the plaintiff further submitted that the application by the applicant should not be entertained on account of the conduct of the applicant in taking part in the auction sale wherein he was a successful bidder in respect of Lot 37 Block 14 Seduan Land District. By so doing, Counsel says, the applicant has acquiesced to or consented to the auction sale being carried out in the manner ordered by the learned Senior Assistant Registrar and is therefore estopped from applying to set aside the sale. In his affidavit supporting his application, the applicant deposed that after knowing of the order of sale made by the learned Senior Assistant Registrar, he decided to bid in the auction sale. His rationale was that if the auction was to proceed, and if subsequently to be confirmed, and if he was successful, at least he would get to keep a parcel of land belonging to the defendant. In taking part in the auction sale, he did not agree with the correctness or otherwise of the order of the learned Senior Assistant Registrar nor did he agree to waive its rights to set aside the said order and/or the auction sale. I accept his evidence on this point. The auction is a public one and his action in the circumstances cannot convert an illegal act into a legal one. The conditions of sale which flow from the order of the learned Senior Assistant Registrar remains an irregularity.

After the order made by the learned Senior Assistant Registrar, the applicant did not appeal against the order. In my view, this too for similar reason will not make an irregular order, when successfully challenged subsequently, into a regular one.

In the final analysis, I am satisfied that the order for sale made by the learned Senior Assistant Registrar for the parcel of land to be sold free from encumbrances is erroneous resulting in a material irregularity in publishing it, and I am satisfied that the applicant has sustained substantial injury by reason of such irregularity. In the circumstances, I allow the application and set aside the sale. The proceeds of the abortive sale amounting to RM48,120 deposited in Court be refunded to the successful bidders.

Costs of this application to the applicant to be taxed.

Also found at [1992] 3 CLJ 1460